

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARTA L. BARRON
Claimant

VS.

KANSAS DIALYSIS SERVICES
Respondent

AND

CONTINENTAL WESTERN INS. CO.
COMMERCIAL UNION INS. CO.
Insurance Carriers

Docket No. 1,001,018

ORDER

Respondent and its insurance carrier, Continental Western Ins. Co., requests review of a preliminary hearing Order entered by Administrative Law Judge Bryce D. Benedict on February 19, 2002.

ISSUES

The Administrative Law Judge (ALJ) determined claimant aggravated a preexisting degenerative disk condition by a series of repetitive traumas at work. The Judge further determined claimant had just cause for the failure to give timely notice.

The respondent and its insurance carrier, Continental Western Ins. Co., raised the following issues on review: (1) whether the ALJ erred in finding the claimant suffered personal injury by accident arising out of and in the course of employment; and, (2) whether the ALJ erred in finding claimant provided timely notice.

Conversely, claimant argues the ALJ's Order should be affirmed.

FINDINGS OF FACT

Having reviewed the evidentiary record compiled to date and filed herein, the Board makes the following findings of fact and conclusions of law:

1. Claimant began employment with respondent on August 17, 1999, as a secretary-receptionist. In January 2001 claimant inquired about the job of acute technician and questioned what the physical requirements of that job were because she had a bad back. Claimant concluded she could perform the work and began duties as an acute technician.

2. The acute technician job required claimant to take a dialysis machine and water treatment system which were on carts to the patient's room to initiate the dialysis procedure. Claimant alleges pushing and pulling the carts caused a gradual progression of back pain.

3. Claimant sought treatment with Dr. Rick R. Tague on February 13, 2001. The doctor's medical record indicates claimant gave a history of back pain for years. Dr. Tague imposed restrictions of no lifting over 10 pounds and no pushing or pulling over 10 pounds of force.

4. When claimant provided her respondent's administrator, Stanley Langhofer, the restrictions from Dr. Tague, she was specifically asked if her back condition was work-related. Claimant denied any work-related connection and offered explanations for her back pain ranging from lifting a dog, a garage door or from dancing in high heels. Claimant was also asked if it was painful pushing the dialysis machine carts and she denied that such job activities caused pain. Claimant was further advised to inform Mr. Langhofer if such activity caused her pain.

5. Claimant continued to receive treatment for her back and the medical records of Dr. Michael L. Smith dated May 7, 2001, contained a history that claimant had been having back problems for at least a year.

6. Claimant obtained the treatment for her back through her health insurance. During the course of treatment for her back complaints beginning in February 2001 and through the end of November 2001, the medical records do not contain any complaints from claimant that work was causing her back pain.

7. Claimant testified she advised her supervisor and the administrator for respondent that pushing and pulling the dialysis machines were causing her back pain. Both her supervisor, Dave Anstaett, and the administrator, Stan Langhofer, denied claimant ever made any such complaints.

8. Mr. Langhofer noted he had meetings with claimant in February, March and July and during each meeting claimant gave non work-related explanations for her back complaints and specifically denied any connection between her work and her back complaints. Mr. Langhofer specifically asked if pushing or pulling the dialysis machines was causing any pain and claimant denied such activity caused any pain.

9. Claimant continued to work and on August 1, 2001, her personal physician referred her to Dr. Glenn M. Amundson for treatment. On August 29, 2001, Dr. Amundson recommended a surgical IDET procedure in order to avoid back fusion surgery. Dr. Amundson noted that this procedure would not be covered by claimant's health care insurance. The claimant's health insurance provider subsequently denied approval for the procedure.

10. The last day claimant worked was November 6, 2001, and on November 19, 2001, claimant was advised that respondent could no longer accommodate her restrictions. At that meeting claimant did not allege her back condition was work-related.

11. On November 30, 2001, claimant met with her supervisor and mentioned filing a workers compensation claim for her back condition.

CONCLUSIONS OF LAW

Claimant has alleged a series of repetitive injuries to her back caused by her job activities of pushing and pulling the dialysis equipment. It is well established under the Workers Compensation Act in Kansas that, when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.¹

The difficulty with the claimant's position is that the contemporaneous medical records do not support her allegations that her work activities aggravated or worsened her back condition. The contemporaneous medical records contain reference to prior occasions of back pain but do not contain mention of a work activity component to her pain. After surgery was recommended, claimant neither requested additional accommodation nor contended her condition was work-related.

Moreover, when respondent was initially provided the claimant's restrictions they were accommodated and claimant was advised not to perform any activity that caused her problems. In addition, at several meetings throughout the time claimant was receiving treatment she repeatedly advised respondent that her job duties were not causing her any pain and that her back problems were caused by a number of non-work-related activities.

There must be evidence that the work activities aggravated or worsened the condition before a compensable injury is established. In this case claimant repeatedly advised respondent that her work activities were not causing her any pain. Nor did claimant advise her health care providers of any such work activity component to her pain.

As the ALJ noted in his Order:

¹ *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

Instead, the better evidence is that once she was laid off, and her health insurance refused to authorize the IDET procedure, she began to look for alternative sources of funding. The Court does believe that until this happened that the Claimant had not seriously considered that her back problem might be work related; she certainly had not intimated this to either her employer or to her health care providers.

The Board concludes the claimant, at this juncture of the proceedings, has failed to establish that during her employment with respondent she suffered a work-related aggravation to her preexisting back condition. Accordingly, she has failed to meet her burden of proof that she suffered accidental injury arising out of and in the course of her employment.

AWARD

WHEREFORE, it is the finding, decision, and order of the Board that the preliminary hearing order dated February 19, 2002, entered by ALJ Bryce D. Benedict should be, and hereby is, reversed.

IT IS SO ORDERED.

Dated this _____ day of November 2002.

BOARD MEMBER

c: James B. Biggs, Attorney for Claimant
Christopher J. McCurdy, Attorney for Respondent & Commercial Union Ins. Co.
Ronald J. Laskowski, Attorney for Respondent & Continental Western Ins. Co.
Bryce D. Benedict, Administrative Law Judge
Director, Division of Workers Compensation